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No. 00-1429

IN THE

Supreme Court of the United States

JOSEPH E. KATZ and ROGER P. MOORE,
on behalf of themselves and 128 others similarly situated,

Petitioners,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is Eleventh Amendment immunity a privilege akin to an affirmative defense that a State may assert or waive?

2. Did the Supreme Court in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), divest federal courts of subject matter jurisdiction over claims brought against States under the Age Discrimination in Employment Act, even if the State expressly consents to suit in the federal forum?

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STATEMENT OF THE CASE

In 1993, Respondent The Regents of the University of California ("Respondent" or "the University") offered a voluntary early retirement incentive program ("VERIP III") to eligible employees of the University of California Retirement Plan ("UCRP"). The eligible employees were those members of the UCRP who were at least 50 years of age and who had at least five (5) years of service in that retirement system. The costs of that incentive program were paid entirely from surplus funds in that retirement plan.

There was a separate retirement system, the Public Employees Retirement System ("PERS"), which covered employees of the University who were employed prior to 1961 when the UCRP came into existence. PERS is a statewide retirement system whose participants include employees of numerous state agencies. It is administered by the State of California.

Employees of the University of California who were members of PERS were not participants in UCRP, did not contribute to UCRP and they were not eligible for the UCRP early retirement plan offered in 1993. Contrary to the assertions made by Petitioners Joseph E. Katz and Roger P. Moore, *et al.* ("Petitioners") that they and other PERS members were "all excluded" from participating in this early retirement plan "solely by reason of their age,"[1] in actual fact, they were never eligible because they were not members of UCRP. Because they were in a separate plan over which the University had no control, an equivalent retirement incentive for PERS members at the University (including

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1. *See* Petition for Writ of Certiorari ("Pet. for Writ"), at 4.

the laboratory employees) would have required the creation of a new retirement plan for PERS members at a cost of at least $40 million.

Petitioners are a class of employees who alleged that the decision of the University to offer an early retirement plan to employees who were members of UCRP, and not to offer a comparable early retirement incentive plan to employees who were members of the separate retirement system PERS, constituted discrimination on the basis of age. On November 14, 1996, Petitioners filed suit against the University in the United States District Court for the Northern District of California, claiming, *inter alia*, violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA").[2]

The University filed an Answer which included several affirmative defenses. It is undisputed that the University did not, however, plead an affirmative defense based upon Eleventh Amendment immunity. (*See* App. A to Resp't Opp. to Pet. for Writ) Petitioners' age discrimination claims were litigated in the District Court for over two years, culminating in a ten day trial in January and February of 1999. The District Court dismissed Petitioners' disparate impact claims during the initial trial proceedings.[3] Petitioners'

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2. Petitioners' age discrimination claims were brought under both the ADEA and the California Fair Employment and Housing Act. Petitioners pleaded and presented identical factual and legal arguments in support of the age discrimination claims under both statutes.

3. Contrary to Petitioners' representations, the District Court did not "sua sponte" dismiss the disparate impact claims. (*See* Pet. for Writ, at 4-5) The University had moved for summary judgment on the disparate impact claims, which the District Court initially denied, and the issue was fully briefed by the parties.

disparate treatment claims were presented to the jury. The jury returned a verdict in favor of the University. (App. B to Pet. for Writ, at 13a-16a)

Petitioners appealed the judgment, seeking to reverse the District Court's dismissal of the disparate impact claims and challenging various evidentiary rulings. In their opening brief, Petitioners affirmatively stated that the Ninth Circuit had jurisdiction over the subject matter of this appeal. After the briefs of both parties were on file, however, Petitioners filed a motion to dismiss, claiming that the federal courts lack subject matter jurisdiction over the age discrimination claims. (App. D to Pet. for Writ, at 19a-35a) Petitioners requested the Ninth Circuit to vacate the judgment and jury verdict unfavorable to Petitioners, and further requested the Ninth Circuit to "allow" Petitioners to re-litigate anew their claims in state court. Petitioners asserted that the Supreme Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), compelled such a result. Petitioners' attempt to avoid the adverse findings of the District Court jury trial by claiming that the proceedings below are a nullity is based upon a distorted interpretation of *Kimel*, 528 U.S. 62. This Court's decision in *Kimel* is inapposite to the facts of this case because, in this case, the University expressly waived its Eleventh Amendment immunity and consented to suit in federal court. (*See* App. E to Pet. for Writ, at 36a-54a)

Prior to *Kimel*, the law of the Ninth Circuit was that Congress's abrogation of States' immunity in private suits for violations of the ADEA was a valid exercise of congressional power, pursuant to the Fourteenth Amendment. *See Keeton v. University of Nevada Sys.*, 150 F.3d 1055, 1057-58 (9th Cir. 1998), abrogated by *Kimel*, 528 U.S. 62.

Therefore, based upon the law of the Ninth Circuit prior to *Kimel*, the University did not have reason to consider whether to invoke its Eleventh Amendment immunity or whether to waive its sovereign immunity and participate in this lawsuit in the federal district court. *See Doe v. Lawrence Livermore Nat'l Laboratory, et al.*, 131 F.3d 836, 838-39 (9th Cir. 1997) (the Regents of the University of California is an arm of the State of California for purposes of invoking Eleventh Amendment immunity); Cal. Const. Art. IX, § 9(a) (Article IX, section 9(f) of the California Constitution confers upon the Regents the power to sue and to be sued, as well as the power of administration and delegation). In light of *Kimel*, the Board of Regents pursuant to California state law and the Bylaws of the Board of Regents, delegated to its General Counsel, James Holst, the authority to waive the University's Eleventh Amendment immunity, and to consent to suit in the federal forum. The General Counsel exercised that authority by filing a declaration with the Ninth Circuit. (App. E to Pet. for Writ, at 49a-54a)

On October 25, 2000, the Ninth Circuit issued its opinion. (App. A to Pet. for Writ, at 1a-12a) The Ninth Circuit denied the Petitioners' motion to dismiss. The Ninth Circuit agreed with the University, concluding that

> [n]othing in *Kimel* suggests that the Court intended to remove the statutory jurisdictional basis for age discrimination suits against a state or its agencies. It held that on account of Eleventh Amendment immunity the states can not be compelled to submit to the jurisdiction of the federal courts in such suits.

(App. A to Pet. for Writ, at 5a); *Katz v. The Regents of the University of California*, 229 F.3d 831, 834 (9th Cir. 2000).

The Ninth Circuit further affirmed the District Court's dismissal of Petitioners' disparate impact claims and the jury's verdict in favor of the University. (App. A to Pet. for Writ, at 6a-12a); *Katz*, 229 F.3d at 835-37.

On December 13, 2000, the Ninth Circuit denied Petitioners' request for rehearing and for rehearing en banc. (App. C to Pet. for Writ, at 17a-18a) This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners contend that the Ninth Circuit's decision is inconsistent with Eleventh Amendment jurisprudence as well as Supreme Court precedent, claiming that Eleventh Amendment sovereign immunity is not a privilege that may be waived by the State. (Pet. for Writ, at 19-27) Petitioners further contend that the Ninth Circuit erred by rejecting their argument that this Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), divested the federal courts of original subject matter jurisdiction over claims brought against a State under the ADEA, even if the State has consented to suit. (Pet. for Writ, at 9-19) Finally, Petitioners argue that the Ninth Circuit's decision creates a conflict among the Circuit Courts of Appeal and presents undesirable and far-reaching implications for Eleventh Amendment jurisprudence in the federal courts. (Pet. for Writ, at 6, 18-27)

Petitioners' contentions are without merit, and it is unnecessary for this Court to grant review. First, the Ninth Circuit's decision is in accord with well settled Eleventh Amendment jurisprudence. This Court has held that Eleventh Amendment immunity is a privilege that may be waived by the State. Second, the University submits that contrary to

Petitioners' assertions, this Court in *Kimel*, 528 U.S. 62, did not divest federal courts of original subject matter jurisdiction over ADEA claims brought against a State, did not render the ADEA unconstitutional as applied to States, and did not divest a State of its authority to consent to suit in the federal forum.

The Ninth Circuit's decision in this case does not create a conflict among the Circuit Courts of Appeal. Not only do Petitioners fail to demonstrate that the decisions of any other federal appellate courts conflict with the Ninth Circuit's decision, Petitioners also fail to cite to any case adopting their position that even if a State has consented to suit, private litigants nevertheless may "invoke" or "assert" the State's Eleventh Amendment immunity, on behalf of the State. Likewise, Petitioners cite no case that supports the proposition that *Kimel* eliminated the federal courts' original subject matter jurisdiction over ADEA claims brought against a State, and that the *Kimel* decision rendered the ADEA unconstitutional as applied to the States.

Finally, contrary to Petitioners' assertions, the Ninth Circuit's decision does not represent a change in Eleventh Amendment law nor does it present any far-reaching negative implications for the development of Eleventh Amendment jurisprudence in future cases. For the reasons set forth below, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

I. The Ninth Circuit Decision Is In Accord With Well Settled Eleventh Amendment Jurisprudence — Eleventh Amendment Immunity Is A Privilege That May Be Waived By the State.

Petitioners contend that Eleventh Amendment immunity is not a privilege that may be waived by the State. (Pet. for Writ, at 19-27) However, Eleventh Amendment jurisprudence on this point is well settled. Not long ago, this Court reaffirmed the principle that a State's Eleventh Amendment immunity is a personal privilege which it may waive at its pleasure:

> While this [Eleventh Amendment] immunity from suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment. . . . *Second, a State may waive its sovereign immunity by consenting to suit.*
>
> . . . .
>
> *We have long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'* . . . Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction . . . or else if the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction. . . .

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670, 675-76, 119 S. Ct.

2219 (1999) (concluding that the State's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce) (citations omitted) (emphasis added).

Indeed, in *Schacht*, this Court was explicit in stating that Eleventh Amendment immunity does not automatically destroy original jurisdiction, but instead creates a defense to be raised or waived by the State:

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381, 389, 118 S. Ct. 2047, 2052-53 (1998) (citations omitted).

Petitioners' attempt to circumvent *Schacht* is unavailing. (*See* Pet. for Writ, at 26-27) In *Schacht*, the State had removed the case to federal court based on claims arising under federal law, and thereafter filed an Answer which asserted its Eleventh Amendment immunity defense to those claims. This Court held that the State properly removed the case to federal court even though it subsequently asserted an Eleventh Amendment immunity defense to those claims. That is, at the time of removal, the case "fell within the 'original jurisdiction' of the federal courts. The State's later invocation of the Eleventh Amendment placed the particular

claim beyond the power of the federal courts to decide, but it did not destroy removal jurisdiction over the entire case." 524 U.S. at 391 (emphasis in original).

In so deciding, this Court made clear that Eleventh Amendment immunity does not automatically destroy original jurisdiction, but is a defense that the State may choose to assert or waive. *Id.* at 389. Petitioners' assertions to the contrary are without merit.[4]

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4. Petitioners further assert that the Ninth Circuit's reliance upon its previous decision in *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999), *as amended*, 201 F.3d 1186 (2000), is "suspect." They argue that under *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999), a State may not impliedly or constructively waive its Eleventh Amendment immunity. (*See* Pet. for Writ, at 17-18) However, *Hill* did not grapple with the theory of implied or constructive waiver. To the contrary, the Ninth Circuit stated that a waiver of Eleventh Amendment immunity must be express and unambiguous, and "must unequivocally evidence the state's intention to subject itself to the jurisdiction of the federal court." 179 F.3d at 758-60 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142 (1985)).

Moreover, the present case poses no such conundrum. Whether or not a State can constructively or impliedly waive sovereign immunity under the Eleventh Amendment is not a question raised by the facts of this case. In this case, the University expressly waived its sovereign immunity and consented to suit in the federal forum. Nowhere in the Ninth Circuit's opinion are questions of implied or constructive waiver discussed. (*See* App. A to Pet. for Writ, at 5a-6a); *Katz v. The Regents of the University of California*, 229 F.3d 831, 834-35 (9th Cir. 2000). Accordingly, review should not be granted based on those illusory issues.

II. The Supreme Court In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), Did Not Divest The Federal Courts Of Original Subject Matter Jurisdiction Over ADEA Claims Brought Against A State, Did Not Render The ADEA Unconstitutional As Applied To States, And Did Not Divest A State Of Its Ability To Consent To Suit In The Federal Forum.

Petitioners contend that the Ninth Circuit's decision runs afoul of this Court's decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), arguing that *Kimel* mandates dismissal of their lawsuit in the federal forum — the forum in which Petitioners themselves chose to bring suit — so that they may re-litigate their claims in state court.

Petitioners contend that the Supreme Court's decision in *Kimel*, 528 U.S. 62, eliminated on constitutional grounds the basis for original subject matter jurisdiction of this action in federal courts under the ADEA and also eliminated any supplemental jurisdiction the District Court may have had over the Petitioners' state law age discrimination claims under California's Fair Employment and Housing Act. Petitioners read *Kimel* to require a determination that all federal court proceedings heretofore conducted in this case are void as having been conducted without any original or supplemental subject matter jurisdiction. (Pet. for Writ, at 12) Petitioners further assert that the ADEA is invalid and unconstitutional in the context of litigation brought by individuals against the States. (Pet. for Writ, at 12-13)

Petitioners misapprehend and distort the holding of *Kimel*, 528 U.S. 62. Contrary to Petitioners' assertions, *Kimel*

does not divest the federal courts of original subject matter jurisdiction over ADEA claims brought against a State. Rather, in *Kimel*, the States by way of an affirmative defense, invoked their sovereign immunity, arguing that the ADEA claims brought against them were barred by their Eleventh Amendment immunity. This Court ultimately dismissed the suits against the States, holding that Congress, by amending the ADEA to make its provisions applicable to the States, exceeded its authority under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity.[5] 528 U.S. at 91-92.

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5. Petitioners repeatedly assert that in *Kimel*, this Court concluded that the 1974 Amendments to the ADEA were "unconstitutional under the Eleventh Amendment." (*See, e.g.*, Pet. for Writ, at 7, 13, 16) Rather, this Court held that Congress exceeded its authority under section 5 of the Fourteenth Amendment by purportedly abrogating the States' sovereign immunity to suits by private individuals under the ADEA. 528 U.S. at 91. Petitioners similarly mischaracterize several other decisions by asserting that certain statutes were found by this Court to "violate[] the Eleventh Amendment" or be "barred by the Eleventh Amendment." (Pet. for Writ at 7-8); *see Board of Trustees of the Univ. of Alabama v. Garrett*, __ U.S. __, 121 S. Ct. 955 (Feb. 21, 2001) (Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999) (concluding that the State's sovereign immunity was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived by the State's activities in interstate commerce); *Florida Prepaid Postsecondary Educ. Expenses Bd. v. College Savings Bank*, 527 U.S. 627, 119 S. Ct. 2199 (1999) (Congress's purported abrogation of States' sovereign immunity under the Patent Remedy Act was invalid under section 5 of the Fourteenth

(Cont'd)

This Court's focus in *Kimel* was upon the language used by Congress in the ADEA to abrogate the States' immunity under the Eleventh Amendment. The *ratio decidendi* of this Court's decision was that the ADEA's purported abrogation of the States' sovereign immunity was invalid, leaving the Eleventh Amendment immunity available to States in ADEA cases. As this Court stated, "We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." *Id.* at 91. *Kimel* did not render the ADEA unconstitutional. *See id.* at 78, 91-92. The ADEA remains valid legislation, even as applied to the States.

In fact, following the decision in *Kimel*, this Court recently held that Congress did not validly abrogate the States' Eleventh Amendment immunity from suits for money damages under Title I of the Americans with Disabilities Act ("ADA"). *Board of Trustees of the Univ. of Alabama v. Garrett*, __ U.S. __, 121 S. Ct. 955 (Feb. 21, 2001). In concluding that Congress's purported abrogation of the States' Eleventh Amendment immunity was invalid, this Court was careful to explain that the ADA itself remained valid legislation, applicable to the States:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit

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(Cont'd)

Amendment); *see also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997) (Congress exceeded its authority under section 5 of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55-73, 116 S. Ct. 1114 (1996) (Indian Commerce Clause did not grant Congress the power to abrogate the States' sovereign immunity).

> by private individuals for money damages under Title I *does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States.* Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 l. Ed. 714 (1908). . . .

Id. at 968 n.9 (emphasis added).

The same reasoning holds true here. This Court's decision in *Kimel* did not render the ADEA constitutionally infirm, did not divest federal courts of original subject matter jurisdiction over ADEA claims brought by parties against the States, and it did not render the States unable to consent to suit in the federal forum. *Kimel* does not mandate dismissal of Petitioners' lawsuit "without prejudice," and does not compel nullification of the federal jury verdict after more than four years of proceedings in the federal courts.

As the Ninth Circuit properly concluded, this Court in *Kimel* simply held that Congress failed to effectively abrogate the States' Eleventh Amendment immunity. Nothing in *Kimel* indicates that this Court was seeking to depart from *Schacht* or divest a State of its ability to consent to suit in the federal forum. As such, sovereign immunity remains a defense available to States in private ADEA lawsuits commenced in the federal courts.

III. The Ninth Circuit Decision Does Not Create A Conflict Among The Circuit Courts of Appeal.

Petitioners assert that the Ninth Circuit decision creates a conflict among the Circuit Courts of Appeal. This simply is not so. Indeed, Petitioners have not cited to a single case — from the other Circuit Courts of Appeal — which supports its tortured interpretation of *Kimel* as having divested the federal courts of original subject matter jurisdiction over ADEA claims brought against the States or as having rendered the ADEA unconstitutional as applied to States. There is no supporting authority for this assertion.

In an attempt to demonstrate a division among the Circuit Courts of Appeal purportedly germane to the present case, Petitioners argue that the Second Circuit and the Sixth Circuit have rendered decisions indicating that they *sua sponte* dismissed ADEA claims raised against the State based on the State's sovereign immunity. (Pet. for Writ, at 21-22) But neither of the two cases cited by Petitioners involves a situation in which a State expressly waived its sovereign immunity and consented to suit in federal court. *See Butler v. New York State Dep't of Law*, 211 F.3d 739, 745-46 (2d Cir. 2000) (dismissing on appeal plaintiff's ADEA claim under *Kimel*, where plaintiff had appealed district court's grant of summary judgment in favor of the State); *Reese v. State of Michigan*, 2000 WL 1647923 (6th Cir. 2000) (unpublished per curiam opinion) (finding that the State had not expressly waived its Eleventh Amendment immunity and dismissing plaintiff's ADA claims on that basis).

It is unclear from the text of the *Butler* opinion whether or not the Second Circuit raised the Eleventh Amendment issue *sua sponte*. *See Butler*, 211 F.3d at 745-46. The opinion

does not recount the procedural history of the case in sufficient detail to determine whether or not the State had previously asserted its immunity. But in any event, there is no indication that the State in *Butler* consented to suit in the federal forum. *Butler* therefore, does not conflict with the Ninth Circuit's decision.[6]

Petitioners next cite a Sixth Circuit decision, *Reese v. State of Michigan*, 2000 WL 1647923 (6th Cir. 2000) (unpublished per curiam opinion). While the Sixth Circuit in *Reese* did raise the issue *sua sponte*, this decision is an unpublished decision, and therefore under the Sixth Circuit's rules should not be cited and has no precedential value. (*See* Sixth Circuit Rule 28(g)) Moreover, it is clear from the Sixth Circuit's opinion that the State had not consented to suit. Indeed, the Sixth Circuit seemed to acknowledge the State's authority to waive its Eleventh Amendment immunity and consent to suit in federal court by stating,

> [A] private litigant may proceed with federal litigation against a state or its agencies if the state has waived its Eleventh Amendment immunity and consented to suit in federal court. . . . Because

6. Moreover, despite Petitioners' suggestions to the contrary, the Second Circuit recognizes that "a state may be divested of immunity and haled into federal court" by waiving its immunity and agreeing to be sued in federal court. *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448 (2d Cir. 1999) (holding that the State did not waive its Eleventh Amendment immunity by failing to raise the defense until it moved for summary judgment). In fact, the Second Circuit has stated explicitly that "[a]s an initial matter, unlike a true jurisdictional bar, the [Eleventh Amendment] defense may be waived. Additionally, the Supreme Court has suggested that it is not obligated to raise the issue on its own motion." *Id.* (citations omitted).

> the State of Michigan has not issued a "clear declaration' expressly consenting to suit in federal court, and because neither [the state agency] nor the state voluntarily invoked federal jurisdiction in this case, the defendants have not waived their Eleventh Amendment immunity.

2000 WL 1647923, at **3 (citations omitted). Thus, *Reese* does not conflict with the Ninth Circuit's decision in the present case.[7]

Petitioners misconstrue the Ninth Circuit's opinion. The Ninth Circuit did not conclude that a court was unable to *sua sponte* consider or raise the issue of Eleventh Amendment immunity; nor did the Ninth Circuit conclude that sovereign immunity is an issue that it "ought to ignore unless raised." (Pet. for Writ, at 22) To the contrary, the Ninth Circuit explained that Eleventh Amendment immunity is a defense that may be asserted or waived by the State, and that the defense need not be raised by the Court. (App. A to Pet. for Writ, at 5a-6a); *Katz*, 229 F.3d at 834. There was no need for the Ninth Circuit to "sua sponte" raise the issue of Eleventh Amendment immunity in the present case, because the University had waived its sovereign immunity, expressly consenting to suit in the federal forum.

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7. Again, despite Petitioners' suggestions to the contrary, the Sixth Circuit recognizes that "a state may waive the protection of the [Eleventh Amendment] by consenting to suit. . . . A state may expressly waive immunity from suit for money damages in court. Consent may also take the form of a voluntary appearance and defense on the merits in federal court. . . ." *Lawson v. Shelby County, Tenn.*, 211 F.3d 331, 334 (6th Cir. 2000) (citations omitted).

In another attempt to thread together cases showing division among the Circuit Courts of Appeal on an issue purportedly germane to the present case, Petitioners argue that "once sovereign immunity has been raised," certain Circuit Courts of Appeal have indicated that "subject matter jurisdiction" is implicated. (Pet. for Writ at 23-24) Even if Petitioners' assertion were true, it is of no consequence to the disposition of this case. In this case, the University did not assert its sovereign immunity; rather, it expressly waived the defense and consented to suit. Thus, this case fails to pose the issue that Petitioners request this Court to review.

The Ninth Circuit decision is not inconsistent with the cases cited by Petitioners. None of the cases cited involved a situation in which the State consented to suit. In fact, the opinions of most, if not all of the cases cited, make clear that the State had affirmatively asserted its Eleventh Amendment immunity.[8] None of those cases involved a

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8. *See Kazmier v. Widmann*, 225 F.3d 519, 523-33 (5th Cir. 2000) (holding that Congress did not abrogate States' Eleventh Amendment immunity under the Family and Medical Leave Act ("FMLA"), and dismissing such claims where the State had moved to dismiss the claims on grounds of sovereign immunity); *Fromm v. Commission of Veterans Affairs*, 220 F.3d 887 (8th Cir. 2000) (holding that Congress did not effectively abrogate States' sovereign immunity under the ADEA, and affirming summary judgment for the State where the State had asserted Eleventh Amendment immunity); *Sims v. University of Cincinnati*, 219 F.3d 559 (6th Cir. 2000) (affirming dismissal of FMLA claims against the State, holding that Congress did not validly abrogate the State's Eleventh Amendment immunity); *Walker v. Illinois Dep't of Corrections*, 213 F.3d 344 (7th Cir. 2000) (concluding that because Congress exceeded its authority under section 5 of the Fourteenth Amendment, plaintiff's ADA claim must be dismissed where the State asserted its Eleventh (Cont'd)

situation where a private litigant — in the guise of raising a "jurisdictional" issue — attempted to avoid an adverse jury verdict by "asserting" the State's Eleventh Amendment immunity on the State's behalf.

(Cont'd)
Amendment immunity); *Stanley v. Wisconsin Dep't of Corrections*, 213 F.3d 340 (7th Cir. 2000) (concluding that because Congress exceeded its authority under section 5 of the Fourteenth Amendment, plaintiff's ADA claims were barred by the State's Eleventh Amendment immunity); *Stevens v. Illinois Dep't of Transportation*, 210 F.3d 732, 736 (7th Cir. 2000) (in holding that Congress did not validly abrogate the States' Eleventh Amendment immunity under the ADA and dismissing such claims where the State moved to vacate on grounds of Eleventh Amendment immunity, the Seventh Circuit stated that "[t]he Eleventh Amendment renders a State immune from any suit brought by an individual in federal court *unless the State has consented to being sued in that forum*.") (emphasis added); *Coger v. Board of Regents of the State of Tenn.*, 209 F.3d 485 (6th Cir. 2000) (holding that Congress did not validly abrogate States' sovereign immunity under the ADEA, and affirming dismissal of ADEA claims where the State had moved to dismiss on grounds of Eleventh Amendment immunity), *vacating* 154 F.3d 296, 299-300 (6th Cir. 1998); *Erickson v. Board of Governors of State Colleges and Univs.*, 207 F.3d 945 (7th Cir. 2000) (holding that Congress had not effectively abrogated the States' Eleventh Amendment immunity under the ADA, and dismissing such claims where the State moved to dismiss on grounds of Eleventh Amendment immunity, but further clarifying that the ADA remains valid legislation as applied to States).

IV. The Ninth Circuit's Decision Does Not Represent A Change In Eleventh Amendment Law Nor Does It Present Any Far-Reaching Negative Implications For Eleventh Amendment Jurisprudence In Future Cases.

Finally, Petitioners proclaim a fear of far-reaching implications from the Ninth Circuit's decision. In what can only be characterized as duplicitous, Petitioners argue that based on the Ninth Circuit's decision, "a state is free to litigate ADEA claims against it in federal court and then assert its sovereign immunity in the event of an unfavorable result." (Pet. for Writ, at 6)[9]

Notably, Petitioners' fears and concerns are addressed by the Ninth Circuit's decision in *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754 (9th Cir. 1999), *as amended*, 201 F.3d 1186 (2000) — the very decision they decry. (Pet. for Writ, at 17-18) *Hill* clearly demonstrates that under Ninth Circuit law, a State may not actively participate in the lawsuit and test the winds of litigation before asserting Eleventh Amendment immunity.[10] *See Hill*, 179 F.3d at 763.

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9. Petitioners commenced this case in federal court, prosecuted their age discrimination claims in the federal court system for four years, obtained adverse court and jury determinations and now seek to negate the entire process by asserting that the federal courts lack subject matter jurisdiction to hear the case because of their "invocation" of the State of California's sovereign immunity.

10. *Hill* presented the situation where the State apparently sought to hold onto its immunity card until the day before trial. The Ninth Circuit concluded that in such a situation, the State had "unequivocally consented to the jurisdiction of the federal court by

(Cont'd)

Such actions on the part of a State defendant will be deemed to constitute an express waiver of its sovereign immunity, thereby precluding the implications feared by Petitioners. The Ninth Circuit decision in the present case embraces *Hill*, and does not dictate a different outcome.

Furthermore, a State's sovereign immunity should not be made subject to the will and whimsy of private litigants seeking a tactical advantage in litigation against the State. The Eleventh Amendment immunity is a shield to be invoked by the University should the University choose to assert it. It is not a sword to be wielded by Petitioners in order to avoid an adverse jury verdict.

As this Court's Eleventh Amendment decisions make clear, Eleventh Amendment immunity is a privilege which the State may assert or may waive at its pleasure. That is, the University may raise Eleventh Amendment immunity as a defense, or the University may choose not to raise the defense. There is no authority that supports the notion that private litigants such as Petitioners may usurp the State's sovereign authority by "invoking" the State's Eleventh Amendment immunity.

(Cont'd)
its conduct in appearing and actively litigating th[e] case on the merits, while waiting until the opening day of trial to first assert immunity under the Eleventh Amendment." *Hill v. Blind Indus. and Servs. of Md.*, 179 F.3d 754, 763 (9th Cir. 1999), as amended, 201 F.3d 1186 (2000). The State was deemed to have waived its sovereign immunity, as "[t]he Eleventh Amendment was never intended to allow a state to appear in federal court and actively litigate the case on the merits, and only later belatedly assert its immunity from suit in order to avoid an adverse result." *Id.*

CONCLUSION

Wherefore, the Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ANSWER TO COMPLAINT FILED APRIL 7, 1997

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THE REGENTS OF THE UNIVERSITY
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CASE NO.: C96-04108 MMC ARB

JOSEPH E. KATZ, ROGER P. MOORE, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendants.

ANSWER TO COMPLAINT

Appendix A

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant The Regents of the University of California ("the Regents" or "Defendant") hereby answers the Complaint of plaintiffs Joseph E. Katz, Roger P. Moore, and others similarly situated, which Complaint alleges, *inter alia*, causes of action for: (1) a disparate impact claim of age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"); (2) a disparate impact claim of age discrimination in violation of the California Fair Employment and Housing Act, Cal. Govt. Code § 12941 ("FEHA"); (3) a disparate treatment claim of age discrimination in violation of the ADEA; (4) a disparate treatment claim of age discrimination in violation of the FEHA; and (5) breach of the implied covenant of good faith and fair dealing, as follows:

1. Answering Paragraph 1 of the Complaint, the Regents deny that "Unlawful employment practices on the basis of age" have occurred and deny that there is any "appropriate relief" required. Except as expressly denied, the Regents admit the allegations in said Paragraph.

2. Answering Paragraph 2 of the Complaint, the Regents admit that, based on information provided to defendant by plaintiff Joseph E. Katz, he is over the age of 40. The Regents deny the remaining allegations in said Paragraph.

3. Answering Paragraph 3 of the Complaint, the Regents admit that, based on information provided to defendant by plaintiff Roger P. Moore, he is over the age of 40. The Regents deny the remaining allegations in said Paragraph.

4. Answering Paragraph 4 of the Complaint, the Regents note that its principal place of business is in Oakland, California, and otherwise admits the allegations in said Paragraph.

5. Answering Paragraph 5 of the Complaint, the Regents admit that the Lawrence Livermore National Laboratory is operated and maintained by the Regents under contract with the Department of Energy. The Regents deny each and every remaining allegation in said Paragraph.

6. Answering Paragraph 6 of the Complaint, the Regents admit that the Ernest Orlando Lawrence Berkeley National Laboratory is operated and maintained by the Regents under contract with the Department of Energy. The Regents deny each and every remaining allegation in said Paragraph.

7. Answering Paragraph 7 of the Complaint, the Regents deny each and every allegation in said Paragraph in that it presumes that there is more than one proper defendant to this action. The only arguably proper defendant to this action is the Regents. The Regents advanced such argument in its Motion to Dismiss, which plaintiffs did not oppose in their brief in Opposition to Defendant's Motion to Dismiss.

8. Answering Paragraph 8 of the Complaint, the Regents admit the allegations in said Paragraph.

9. Answering Paragraph 9 of the Complaint, the Regents admit that venue of this action belongs in the Northern District of California. The Regents deny each and every remaining allegation contained in said Paragraph.

10. Answering Paragraph 10 of the Complaint, the Regents admit the allegations in said Paragraph.

11. Answering Paragraph 11 of the Complaint, the Regents are without sufficient knowledge or information to form a belief

as to the truth of the allegation that the class is limited to PERS members who were also members of an unincorporated association known as "APLE-LAG" who would have accepted the VERIP early retirement incentive had it been offered to them. The Regents are without sufficient knowledge or information to form a belief as to the truth of the allegation that the class members will obtain the consent of this Court to join this action pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b), as incorporated into the ADEA. The Regents deny each and every remaining allegation contained in said Paragraph.

12. Answering Paragraph 12 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

13. Answering Paragraph 13 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

14. Answering Paragraph 14 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

15. Answering Paragraph 15 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

16. Answering Paragraph 16 of the Complaint, the Regents admit that on or about May-June of 1993, eligible employees of the University of California at the Lawrence Livermore National Laboratory and Lawrence Berkeley Laboratory who were participants in the University of California Retirement System were offered a voluntary retirement incentive of three years of service credit, three years of age credit and three months extra pay. The Regents admit that such retirement incentive was called "VERIP III". The Regents further admit that PERS employees were not offered VERIP III. The Regents deny each and every remaining allegation contained in said Paragraph.

Appendix A

17. Answering Paragraph 17 of the Complaint, the Regents deny each and every allegation in said Paragraph.

18. Answering Paragraph 18 of the Complaint, the Regents deny each and every allegation in said Paragraph.

19. Answering Paragraph 19 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

20. Answering Paragraph 20 of the Complaint, the Regents are without sufficient knowledge or information to form a belief as to the truth of the allegations in said Paragraph.

21. Answering Paragraph 21 of the Complaint, the Regents deny that plaintiffs timely exhausted their federal and/or state administrative remedies. The Regents admit that a right to sue letter to plaintiffs by the Department of Fair Employment and Housing is dated January 10, 1995. The Regents admit that right to sue letters to plaintiffs by the EEOC are dated October 11, 1996 and have been attached to the complaint as exhibits. The Regents deny each and every remaining allegation contained in said Paragraph.

22. Answering Paragraph 22 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

23. Answering Paragraph 23 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-22, inclusive, of the Complaint.

24. Answering Paragraph 24 of the Complaint, the Regents deny each and every allegation as contained in said Paragraph.

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25. Answering Paragraph 25 of the Complaint, the Regents deny each and every allegation as contained in said Paragraph.

26. Answering Paragraph 26 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-25, inclusive, of the Complaint.

27. Answering Paragraph 27 of the Complaint, the Regents deny each and every allegation in said Paragraph.

28. Answering Paragraph 28 of the Complaint, the Regents deny each and every allegation in said Paragraph.

29. Answering Paragraph 29 of the Complaint, the Regents deny each and every allegation in said Paragraph.

30. Answering Paragraph 30 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-29, inclusive, of the Complaint.

31. Answering Paragraph 31 of the Complaint, the Regents deny each and every allegation in said Paragraph.

32. Answering Paragraph 32 of the Complaint, the Regents deny each and every allegation in said Paragraph.

33. Answering Paragraph 33 of the Complaint, the Regents deny each and every allegation in said Paragraph.

34. Answering Paragraph 34 of the Complaint, the Regents hereby incorporate by reference as if fully set forth herein its answer to Paragraphs 1-33, inclusive, of the Complaint.

35. Answering Paragraph 35 of the Complaint, the Regents deny each and every allegation in said Paragraph.

36. Answering Paragraph 36 of the Complaint, the Regents deny each and every allegation in said Paragraph.

37. Answering Paragraph 37 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

38. Answering Paragraph 38 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

39. Answering Paragraph 39 of the Complaint, the Regents deny each and every allegation contained in said Paragraph.

Appendix A

AFFIRMATIVE DEFENSES

As and for its Affirmative Defenses to the Complaint, Defendant avers upon information and belief as follows:

FIRST SEPARATE AND AFFIRMATIVE DEFENSE
(Exhaustion of Administrative Remedies)

Plaintiffs' claims are barred, in whole or in part, by the failure to exhaust their administrative remedies in a timely fashion as required under the ADEA, 29 U.S.C. § 626(d), and/or the FEHA, Cal. Govt. Code § 12941.

SECOND SEPARATE AND AFFIRMATIVE DEFENSE
(Legitimate Business Interests)

Plaintiffs' claims for disparate impact are barred because to the extent plaintiffs were not offered an early retirement incentive, this decision is not actionable as it was done to serve the Regents' legitimate business interests.

THIRD SEPARATE AND AFFIRMATIVE DEFENSE
(Legitimate Nondiscriminatory reason)

Plaintiffs' claims for disparate treatment are barred because to the extent plaintiffs were treated differently, such treatment was not based on their age or other protected basis. Instead, any such action was taken for legitimate nondiscriminatory reasons.

Appendix A

FOURTH SEPARATE AND AFFIRMATIVE DEFENSE
(Reasonable Factors Other than Age)

Plaintiffs' claims for age discrimination under the ADEA are barred because the Regents' decision not to offer a VERIP-III like incentive to PERS members was a decision based on reasonable factors other than age pursuant to 29 U.S.C. § 623(f)(1).

FIFTH SEPARATE AND AFFIRMATIVE DEFENSE
(Observance of the Terms of a Bona Fide Employee Benefit Plan)

Plaintiffs' claims for age discrimination under the ADEA are barred because any action by the Regents was done to observe a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of the Act, pursuant to 29 U.S.C. § 623(f)(2)(B)(ii).

SIXTH SEPARATE AND AFFIRMATIVE DEFENSE
(Statute of Limitations)

Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations.

SEVENTH SEPARATE AND AFFIRMATIVE DEFENSE
(Estoppel, Waiver and Forfeiture)

Plaintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, waiver and forfeiture by reason of Plaintiffs' conduct, actions and communications to the Regents and/or its agents or employees.

Appendix A

EIGHTH SEPARATE AND AFFIRMATIVE DEFENSE
(Laches)

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

NINTH SEPARATE AND AFFIRMATIVE DEFENSE
(Unclean Hands)

Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

TENTH SEPARATE AND AFFIRMATIVE DEFENSE
(Lack of Damages)

The Regents allege that plaintiffs have not been damaged in any amount, manner, or at all by reason of any act alleged against defendant in the Complaint and therefore the relief prayed for in the Complaint cannot be granted.

ELEVENTH SEPARATE AND AFFIRMATIVE DEFENSE
(No Entitlement to Attorneys Fees)

The Regents allege that neither the Complaint nor the causes of action purportedly stated therein states facts sufficient to constitute a claim for attorneys' fees.

TWELFTH SEPARATE AND AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

The Regents allege that neither the Complaint nor the causes of action purportedly stated therein states facts sufficient to constitute a claim for punitive damages against defendant.

Appendix A

THIRTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Failure to State a Claim)

The Complaint, and each and every count alleged therein, fails to state a claim upon which relief can be granted.

FOURTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Not a Proper Class Action)

This action is not a proper or appropriate class action.

FIFTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Not Adequate Class Representatives)

Plaintiffs are not adequate class representatives of the purported class they seek to represent.

SIXTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

Plaintiffs have neglected and failed to mitigate their alleged damages.

Appendix A

SEVENTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(Manager's Discretion)

The Regent's conduct was at all times within the proper and lawful exercise of its management discretion.

EIGHTEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

The Regents allege that plaintiffs cannot claim exemplary or punitive damages against defendant pursuant to California Government Code Section 818 (which provides, in pertinent part, that a public entity is not liable for such damages) and California Government Code Section 811.2 (which provides, in pertinent part, that the Regents of the University of California is a "public entity").

NINETEENTH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Entitlement to Punitive or Exemplary Damages)

Plaintiffs cannot allege exemplary or punitive damages pursuant to 42 U.S.C. Section 1981a.

TWENTIETH SEPARATE AND
AFFIRMATIVE DEFENSE
(No Disparate Impact Theory)

Plaintiffs cannot rely on disparate impact theory to prove discrimination on the facts alleged.

Appendix A

WHEREFORE, defendant the Regents of the University of California prays for judgment as follows:

1. That plaintiffs take nothing by reason of their Complaint, and that judgment be rendered in favor of the Regents;

2. That defendant be awarded its costs of suit and attorneys fees incurred in defense of this action; and

3. For such other and further relief as the Court deems just and proper.

Dated: April 7, 1997

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By s/ Millicent S. Meroney
Millicent S. Meroney

Attorneys for Defendant
The Regents of the University of California